

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ELIZABETH DE COSTER, *et al.*, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

AMAZON.COM, INC., a Delaware
corporation,

Defendant.

Case No. 2:21-cv-00693-RSM

**PLAINTIFFS' RESPONSE TO
NOTICE OF SUPPLEMENTAL
AUTHORITY RELATING TO
DEFENDANT AMAZON.COM INC.'S
MOTION TO DISMISS AMENDED
COMPLAINT**

NOTE ON MOTION CALENDAR:
January 21, 2022

1 Plaintiffs provide the following response to Amazon's notice of supplemental authorities
2 [ECF 52, Exs. A, B, and C]:

3 In the related action, *Frame-Wilson v. Amazon.com, Inc.*, No. 2:20-cv-00424-RAJ,
4 which like this action also asserts that Amazon's MFN agreements causes consumer
5 overcharges, Judge Jones rejected Amazon's contention that its MFN agreements are *per se* legal
6 and held that the *Frame-Wilson* plaintiffs stated plausible monopoly claims and a plausible price-
7 fixing under the rule of reason. 2022 U.S. Dist. LEXIS 44109 (W.D. Wash. Mar. 11, 2022). That
8 the court in the District of Columbia reached a different decision based on different allegations
9 and under the onerous reconsideration standard in *District of Columbia v. Amazon.com, Inc.*,
10 2021 CA 001775 B (D.C. Super. August 1, 2022) (ECF 64, Exs. A & B), does not support a
11 rejection of Judge Jones' opinion or a rejection of Plaintiffs' claims here. Critically, the District
12 of Columbia court held that the Attorney General provided only conclusory factual allegations of
13 harm to the market, failing, for example, to identify any products that Amazon's MFN
14 agreements caused to be sold at supracompetitive prices. Ex. B at 13. By contrast, in support of
15 their theory that Amazon's MFN agreements demand price parity, Plaintiffs in this action
16 provide specific examples of third-party sellers that, to conform with their obligations under the
17 MFN agreements, sold their goods at higher prices on sites that compete with Amazon
18 Marketplace. Consolidated Amended Complaint ("CAC") (ECF 20), ¶¶ 46, 113-14.

19 With respect to the August 3, 2022 Report and Recommendation ("R&R") in *In re*
20 *Amazon.com, Inc. eBook Antitrust Litigation*, No. 21-cv-00351 (GHW) (VF) (S.D.N.Y.) (ECF
21 64, Ex. C), Amazon relies on pp. 21-23 of the R&R, where the magistrate concluded that
22 allegations that the major trade publishers each entered into the identical agreements with
23 Amazon to eliminate retail price competition and raise eBook pricing did not provide direct
24 evidence that the publishers colluded *with each other* to achieve these results. Amazon further
25 relies on pp. 31-33 of the R&R, where the magistrate concluded that it was not plausible to infer
26 from the nature of the restraint that the publishers colluded *with each other*. The cited passages
27 are inapposite. Plaintiffs here do not allege a *tacit* conspiracy *among* third-party sellers, but
28

1 rather *written* MFN agreements *between* Amazon and each of its third-party sellers, and that
 2 consistent with these agreements Amazon's third-party sellers price their goods on competing
 3 sites at supracompetitive prices. CAC, ¶ 20; *see also Frame-Wilson v. Amazon.com, Inc.*, 2022
 4 U.S. Dist. LEXIS 44109 at *12 and *21. As Amazon's own authority demonstrates, an express
 5 agreement establishes the concert of action requirement. *Paladin Assocs., Inc. v. Mont. Power*
 6 *Co.*, 328 F.3d 1145, 1153-54 (9th Cir. 2003) (cited by Amazon ECF No. 35 at 15). To meet this
 7 element of a Section 1 claim, the Ninth Circuit does not require proof of an intent to control
 8 prices or exclude competition; that consideration is relevant solely for purposes of determining
 9 whether the restraint is *unreasonable*. *Id.* As argued in Plaintiffs' opposition to Amazon's motion
 10 to dismiss, Amazon's MFN agreements are unreasonable as *per se* illegal horizontal price-fixing
 11 agreements and under the rule of reason because they restrain price competition and raise
 12 consumer prices in the relevant markets. ECF 39 at 5-14.

13 Finally, Amazon relies on pp. 46-47 of the R&R, where the magistrate relied on
 14 *Bookhouse of Stuyvesant Plaza, Inc. v. Amazon.com*, 985 F. Supp. 2d 612 (S.D.N.Y. 2013), to
 15 conclude that for purposes of the *eBook* plaintiffs' rule of reason claim, the plaintiffs could not
 16 aggregate the publisher defendants' collective market shares to satisfy allegations of the market
 17 impact of the challenged agreements. This argument is inapposite, as Amazon did not raise it in
 18 its motion to dismiss here. In any event, *Bookhouse* is inconsistent with the Ninth Circuit
 19 authorities, which permit aggregate effects. *See, e.g., Rebel Oil Co., Inc. v. Atlantic Richfield*
 20 *Co.*, 51 F.3d 1421, 1437 (9th Cir. 1995) ("The aggregation of market shares of several rivals is
 21 justified if the rivals are alleged to have conspired to monopolize."); *Twin City Sportservice, Inc.*
 22 *v. Charles O. Finley & Co.*, 676 F.2d 1291, 1303 (9th Cir. 1982) ("[I]t was proper for the district
 23 court to have aggregated Sportservice's contracts in the relevant market in order to assess the
 24 Sherman Act violations resulting from these contracts."); *Orchard Supply Hardware LLC v.*
 25 *Home Depot USA, Inc.*, 967 F. Supp. 2d 1347, 1363 (N.D. Cal. 2013) ("Aggregating the effect"
 26 of the defendant retailer's two separate agreements with suppliers for purposes of alleged
 27 violation of Section 1 was "appropriate for the purpose of showing the [retailer's] conduct was
 28

1 anticompetitive[.]”); *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1376 (1992)
 2 (recognizing that “it would not be proper to focus on specific individual acts of an accused
 3 monopolist while refusing to consider their overall combined effect.”); *Klein v. Facebook, Inc.*,
 4 2022 U.S. Dist. LEXIS 8081, at *135-36 (N.D. Cal. Jan. 14, 2022) (collecting cases, in which
 5 courts analyze the aggregate effect of a series of anticompetitive acts committed by the
 6 defendant, and holding that “Ninth Circuit endorsed this” approach when it held that “it would
 7 not be proper to focus on specific individual acts of an accused monopolist while refusing to
 8 consider their overall combined effect.”) (quoting *City of Anaheim*, 955 F.2d at 1376).

9 DATED: August 9, 2022

Respectfully submitted,

10 HAGENS BERMAN SOBOL SHAPIRO LLP

11 By: /s/ Steve W. Berman

12 Steve W. Berman (WSBA No. 12536)

13 By: /s/ Barbara A. Mahoney

14 Barbara A. Mahoney (WSBA No. 31845)

15 1301 Second Avenue, Suite 2000

16 Seattle, WA 98101

17 Telephone: (206) 623-7292

18 Facsimile: (206) 623-0594

19 steve@hbsslaw.com

20 barbaram@hbsslaw.com

21 KELLER POSTMAN LLC

22 Zina G. Bash (pro hac vice)

23 111 Congress Avenue, Suite 500

24 Austin, TX, 78701

25 Telephone: (512) 690-0990

26 E-mail: zina.bash@kellerpostman.com

27 Warren D. Postman (pro hac vice)

28 Albert Y. Pak (pro hac vice)

1100 Vermont Avenue, N.W., 12th Floor

Washington DC, 20005

Telephone: (202) 918-1123

E-mail: wdp@kellerpostman.com

E-mail: albert.pak@kellerpostman.com

Interim Lead Counsel for Plaintiffs

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

By: /s/ Alicia Cobb
Alicia Cobb, WSBA # 48685
1109 First Avenue, Suite 210
Seattle, WA 98101
Telephone: (206) 905-7000
Email: aliciacobb@quinnemanuel.com

Steig D. Olson (pro hac vice)
David D. LeRay (pro hac vice)
Nic V. Siebert (pro hac vice)
51 Madison Avenue, 22nd Floor
New York, NY 10010
Telephone: (212) 849-7000
Email: steigolson@quinnemanuel.com

Adam B. Wolfson (pro hac vice)
865 South Figueroa Street, 10th Floor
Los Angeles, CA 90017-2543
Telephone: (213) 443-3000
Email: adamwolfson@quinnemanuel.com

KELLER ROHRBACK L.L.P.

By: /s/ Derek W. Loeser
Derek W. Loeser (WSBA No. 24274)
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
Telephone: (206) 623-1900
Facsimile: (206) 623-3384
dloeser@kellerrohrback.com

Plaintiffs' Executive Committee Members

MILBERG COLEMAN BRYSON
PHILLIPS GROSSMAN, PLLC

Peggy J. Wedgworth*
Elizabeth McKenna*
Robert A. Wallner*
Blake Hunter Yagman*
100 Garden City Plaza, Suite 500
Garden City, New York 11530
Telephone: 212-594-5300
pwedgworth@milberg.com
emckenna@milberg.com
rwallner@milberg.com
byagman@milberg.com
**Pro Hac Vice Forthcoming*

Attorneys for Megan Smith

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2022, a true and correct copy of the foregoing was filed electronically by CM/ECF, which caused notice to be sent to all counsel of record.

/s/ Steve W. Berman
Steve W. Berman